Supreme Court, U.S.
FILED
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No. 95 3

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

KIRK M. BROWN
PETITIONER,

v.

THADDEUS KILGORE, JR.
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11 AFSCME/AFL CIO
STATE EMPLOYMENT RELATIONS BOARD,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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PETITIONER pro se

4/4/pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Ohio Supreme Court erred in dismissing a claimed appeal of right as not involving any substantial constitutional question.

II. Whether the Ohio Supreme Court can abridge the due process rights of public employees that are protected by the 14th Amendment to the Constitution of the United States.

PARTIES

The parties below are listed in the caption of the case.

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No._____

In The Supreme Court of the United States

October Term, 1994

KIRK M. BROWN
Petitioner,

v.

THADDEUS KILGORE, JR.
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11 AFSCME/AFL CIO
STATE EMPLOYMENT RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

---

Petition for a writ of certiorari

Petitioner respectfully requests that a writ of certiorari issue to review the decision of the Ohio Supreme Court.

OPINIONS BELOW

The decision of the Ohio Supreme Court is included in the Appendix at p. 1a. The dismissal by the State Employment Relations Board of the Unfair Labor Practice charge is included in the Appendix at pg. 2a. The decision of the Court of Common Pleas of Franklin County Ohio is included in the Appendix at p. 4a. The decision of the Tenth District Court of Appeals, Franklin County Ohio is included in the Appendix at p. 6a.

JURISDICTION

(i) The decision sought to be reviewed (the dismissal of a claimed appeal of right as not involving any substantial constitutional question) was entered on March 29, 1995.

(ii) No motion for rehearing from the dismissal was filed. No request for an extension of time to file this petition for a Writ of Certiorari was requested.

(iii) This Court's jurisdiction is invoked pursuant to Article III Section 2 of the Constitution of the United States and 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III

Section 2. (1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different states;--between Citizens of the same State claiming Lands

under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(2) In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

United States Constitution, Amendment 14, 1868

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution, Article IV

Section 2(B)(2). The Supreme Court shall have appellate Jurisdiction as follows:

(a) In appeals from the Courts of Appeals as a matter of Right in the following:
  (i) Cases originating in the Courts of Appeals;
  (ii) Cases in which the death penalty has been affirmed;
  (iii) Cases involving questions arising under the Constitution of the United States or of this State.

STATUTES INVOLVED

28 USC 1257
State Courts; Certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statues of, or any commission held or authority exercised under, the United States.

Ohio Revised Code
Chapter 119 Administrative Procedure

1) Section 119.01 Definitions
(D) "Adjudication" means the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person...

2) Section 119.12 Appeal by Party Adversely Affected; Notice; Hearing
Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin County.

Chapter 4117 Public Employee Collective Bargaining Law

3) Section 4117.02
(M) Except as otherwise specifically provided in this section, the board is subject to Chapter 119. of the Revised Code.

4) Section 4117.11
(B) It is an unfair labor practice for an employee organization, its agents or representatives, or public employees to: (1) Restrain or coerce employees in the exercise of the rights guaranteed in Chapter 4117. of the Revised Code. This division does not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or an employer in the selection of his representative for the purpose of collective bargaining *(sic)* or the adjustment of grievances.

5) Section 4117.12 Remedies
(A) Whoever violates Section 4117.11 of the Revised Code is guilty of an unfair labor practice remediable by the state employment relations board as specified in this section.
(B) When anyone files a charge with the board alleging that an unfair labor practice has been committed, the board or its designated agent shall investigate the charge. If the board has probable cause for believing that a violation has occurred, the board shall issue a complaint and shall conduct a hearing concerning the charge. The board shall cause the complaint to be served upon the charged party which shall contain a notice of the time at which the hearing on the complaint will be held either before the board, a board member, or a hearing officer.

6) Section 4117.13 Judicial Review; Effects of Findings of Board; Procedures
(D) Any person aggrieved by any final order of the board granting or denying, in whole or in part, the relief sought may appeal to the court of common pleas of any county where the unfair labor practice in question was alleged to have been engaged in, or where the

person resides or transacts business, by filing in the court a notice of appeal setting forth the order appealed from and the grounds of appeal.

Chapter 2505 Procedure on Appeal

7) Section 2505.02 Final Order

An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

COMMON PLEAS COURT FRANKLIN COUNTY OHIO RULES OF PRACTICE

Rule 21 Hearings and Submission of Motions

21.01 All motions shall be accompanied by a brief stating the grounds and citing the authorities relied upon. The opposing counsel or a party shall serve any answer brief on or before the 14th day after the date of service as set forth on the certificate of service attached to the served copy of the motion.

STATEMENT OF THE CASE

This appeal seeks to overturn the Ohio Supreme Courts determination in the case of *Ohio Assn. Of Pub. School Emp., Chapter 643, AFSCME, AFL-CIO v. Dayton City School Dist. Bd. Of Edn.* (1991), 59 Ohio St. 3d 159 that a determination is not a determination.

> "Because the majority is fundamentally wrong on the facts, on the law, and on the public policy which this case impacts, I must respectfully dissent."

> "The majority's sleight of hand will pass to the reader with little or no knowledge of the Public Employee's Collective Bargaining Act, but it can not pass to anyone who reads the Act with understanding..."
>
> "Further, it will be noted that the majority, by the adroit use of ellipses, conveniently leaves out part of the verbiage of RC 4117.13D."
>
> Excerpts from dissenting opinion of Ohio Supreme Court Justice Andrew Douglas.

Concurring with the dissenting opinion in this case was Justice Sweeney. Justice Resnick concurred with the majority but wrote separately and strongly recommended that the Legislature amend the law in question because in a departure from our governments system of checks and balances, excessive authority is held by one state agency. Justices Holmes and Wright and Chief Justice Moyer concurred in the majority opinion of Justice Brown which was amended, subsequent to the poignant dissenting opinion being written, to address the dissenting opinion. The case is included in the Appendix at p. 9a.

BACKGROUND

On April 1, 1984 Ohio's Public Employee Collective Bargaining Law (Ohio Revised Code Ch. 4117) went into effect. It created the State Employment Relations Board (SERB Board). The board has:

- Exclusive jurisdiction to hear unfair labor practice charges [O.R.C. CH. 4117.12(A)].
- A duty to issue a complaint and conduct a hearing if it has probable cause for believing that a violation has occurred [O.R.C. CH. 4117.12(B)].
- Accountability through judicial review. The right to appeal any final order of the board is provided in O.R.C. CH. 4117.13(D). The board is also subject to the administrative procedure law, O.R.C. CH. 119 [pursuant to O.R.C. CH. 4117.02(M)] which provides for the right to appeal an adjudication of the board (O.R.C. CH. 119.12).

The matter before the Ohio Supreme Court in the case of *Ohio Assn. Of Public School Employees, Supra*, was whether or not the general assembly intended that the SERB board's determination of lack of probable cause should be a final appealable order. The SERB board filed an amicus curie brief successfully urging affirmance of the lower court decision. The syllabus states:

> "A decision by the state employment relations board whether or not to issue a complaint in an unfair labor practice case is not reviewable pursuant to R.C. Chapter 119 or R.C. 4117.02(M) and 4117.13(D)."

THE PRESENT CASE

On January 11, 1993, Kirk M. Brown filed an unfair labor practice charge with the State Employment Relations Board (SERB Board) alleging a violation of Ohio Revised Code Section 4117.11(B)(1) on the part of his union and Chapter President. (Case No. 93-ULP-01-0019).

On October 28, 1993, the SERB Board dismissed the unfair labor practice charge stating:

> "The investigation reveals that there is no probable cause to believe that the charged party has violated Ohio Revised Code Section 4117.11. The information gathered during the investigation failed to establish the probability of any unlawful interference with rights guaranteed by Ohio Revised Code §4117.03."

The dismissal was mailed November 19, 1993 and received by Mr. Brown on November 23, 1993.

On December 6, 1993 Mr. Brown filed a Notice of Appeal (Case No. 93 CVF 12-8557) in the Court of Common Pleas of Franklin County Ohio pursuant to O.R.C. CH. 119.12 seeking the equity of due process and reimbursement of costs (complaint p. 2). The appellees were Thaddeus Kilgore, Jr. (Chapter President), The Ohio Civil Service Employees Association Local 11 AFSCME AFL-CIO, and the State Employment Relations Board. The appellees filed motions to dismiss citing the authority of the Ohio Supreme Court decision in the case of *Ohio Assn. Of Pub. School Emp., Supra,* (mailed December 21, 1993 and January 5, 1994). An appellants brief in opposition to motions to dismiss was mailed January 12, 1994 arguing points of state law. Within the 14 day time limit of local rule 21 of the court, the 14th amendment to the constitution of the United States was cited by the appellant in the appellant's brief (p. 1) as a supplement to the brief in opposition to the motions to dismiss (mailed January 18, 1994 and filed January 21, 1994). On February 28, 1994 the court sustained the motions of appellees to dismiss.

A notice of appeal to the court of appeals of Franklin County Ohio, Tenth Appellate District was mailed March 29, 1994 and filed April 1 (corrected docketing statement mailed April 7, and re-filed May 12, 1994). On May 28, 1994 the appellants brief was mailed which at p. 3 & p 6, argued that the Ohio Supreme Court decision in *Ohio Assn. Of Pub. School Emp., Supra* is an unconstitutional abridgement of the right of appeal granted to Ohio Public Employees in O.R.C. CH. 4117.13(D) and O.R.C. CH. 119.12, and that it is an unconstitutional depravation of the

right to due process of law citing the 14th Amendment. The argument about the issue of the test of constitutionality and the appellees' failure to address and refute it is also in the reply brief of appellant to brief of appellee State Employment Relations Board (mailed June 27, 1994) at pg. 2 and 5 and in the reply brief of appellant to brief of appellees Ohio Civil Service Employees Association and Thaddeus Kilgore, Jr. (Mailed July 2, 1994) at pg. 2, 3, and 5. On October 25, 1994 the court of appeals affirmed the judgment of the Franklin County Court of Common Pleas. It is noteworthy that the opinion of the appeals court was written by Judge Robert E. Holmes, who previously, with the Ohio Supreme Court, concurred in the majority opinion in the case of *Ohio Assn. Of Pub. School Emp., Supra.*

On December 15, 1994 a Claimed Appeal of Right was filed in the Ohio Supreme Court along with a memorandum in support of jurisdiction of appellant Kirk M. Brown. The argument about the issue of the test of constitutionality runs throughout the memorandum from page 1 to 5. The Ohio Supreme Court declined jurisdiction and dismissed the appeal as not involving any substantial constitutional question.

REASONS FOR GRANTING CERTIORARI

I. THE OHIO SUPREME COURT ERRONEOUSLY DISMISSED A CONSTITUTIONAL CHALLENGE TO A DECISION OF THAT COURT AS NOT INVOLVING ANY SUBSTANTIAL CONSTITUTIONAL QUESTION.

The Ohio Supreme Court shall have appellate jurisdiction in appeals as a matter of right in cases involving questions arising under the constitution of the United States pursuant to Article IV Section of 2(B) of the Ohio Constitution. The 14th Amendment to the Constitution of The United States was cited as precluding the Ohio Supreme Court's decision in the case of *Ohio Assn. Of Pub. School*

Emp., Chapter 643, AFSCME, AFL-CIO v. Dayton City School Dist. Bd. of Edn. (1991), 59 Ohio St. 3d 159. It was argued that the ruling in that case:

A. Abridged an existing right of appeal, provided in two Ohio statutes to tens of thousands of public employees.

B. Established an inadequacy of remedies at law resulting in a depravation of liberty and due process which is precluded by the 14th Amendment of the United States Constitution.

The dismissal of the claimed appeal of right constitutes a decision of an important question of federal law which has not been, but should be settled by this court, [*R.J. Reynolds Tobacco Co. v. Durham County, N.C.* (U.S.N.C. 1986) 107 S. Ct. 499, 479 U.S. 130, 93 L. Ed. 2d 449.]

II. THE OHIO SUPREME COURTS DECISION IN THE CASE OF *OHIO ASSN. OF PUB. SCHOOL EMP. CHAPTER 643, AFSCME AFL-CIO v DAYTON CITY SCHOOL DIST. BD. OF EDN.* IS PRECLUDED BY THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

> The conclusion of the Ohio Supreme Court that:
> "A determination by the State Employment Relations Board (SERB Board) as to whether to prosecute an unfair labor practice charge is not an adjudication"

is repugnant to the duly passed laws of Ohio and has created an inadequacy of remedies at law. The effect of that conclusion is repugnant to the 14th Amendment of the United States Constitution and to our governments system of checks and balances.

Because a dismissal by the SERB Board is a determination by the highest authority of that agency, that a person who has filed an unfair labor practice charge has no

right to a hearing or to the relief sought, it is an adjudication pursuant to the Administrative Procedure Law [O.R.C. CH. 119.01(D)] which reads in pertinent part:

> "Adjudication means the determination by the highest authority of an agency of the rights, duties, privileges, benefits or legal relationships of a specified person..."

The SERB Board is subject to O.R.C. CH. 119 pursuant to the Public Employee Collective Bargaining Law [O.R.C. CH. 4117.02(M)] which reads in pertinent part:

> "Except as otherwise specifically provided in this section, the board is subject to Chapter 119 of the Revised Code."

The language of the Ohio Revised Code clearly shows that a dismissal of an unfair labor practice charge by the SERB Board is an adjudication, notwithstanding the conclusion of the Ohio Supreme Court. O.R.C. CH. 119.12 reads in pertinent part:

> "Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin County..."

It is an unrefuted fact that adjudications are appealable. The right to appeal is also found in O.R.C. CH. 4117.13 (D) which reads in pertinent part:

> "Any person aggrieved by any final order of the board granting or denying in whole or in part, the relief sought may appeal to the court of common pleas of any county where the unfair labor practice in question was alleged to have been engaged in..."

Final order is defined in O.R.C. CH. 2505.02 entitled Procedure on Appeal which reads in pertinent part:

> "An order that affects a substantial right in an action which in effect determines the action and prevents a judgment. An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment...is a final order..."

The dismissal of an unfair labor practice charge by the SERB Board affects the substantial right of a complaining party to a hearing and to the relief sought. A dismissal effectively determines the action and prevents a judgment from being obtained by the complainant. A dismissal is also made in a special proceeding.

The dismissal of an unfair labor practice charge by the State Employment Relations Board is a final order and an adjudication according to the language of the Ohio Revised Code. The intent of the legislative branch of government in Ohio is clear on this point.

The right to appeal a dismissal of an unfair labor practice charge was recognized by the courts before it was abridged by the Ohio Supreme Court. *Dugan v. SERB* 1990 SERB 4-7 (C.P. Franklin, 2-8-90).

> "A common pleas court reviewing the dismissal of an unfair labor practice charge by the State Employment Relations Board is to examine the circumstances surrounding the investigation to determine whether the board abused its discretion by its dismissal of the charge."

Communications Workers of America v. SERB 1987 SERB 4-12 (7th Dist. Ct. App. Jefferson, 3-31-87).

> "SERB does not possess the unreviewable discretion exercised by the NLRB General Counsel as to whether a complaint should issue on an unfair labor practice charge."

State ex rel Glass Blowers' International Union Local #333 v. SERB 1991 SERB 4-131 (10th Dist. Ct. App., Franklin, 12-3-91).

> "Decisions of administrative agencies are always subject to review, if not to appeal, and to hold otherwise would deprive an affected party of his right to due process of law,..."

The State Employment Relations Board is given exclusive jurisdiction in O.R.C. CH. 4117.12(A) which reads in pertinent part:

> "Whoever violates Section 4117.11 of the Revised code is guilty of an unfair labor

> practice remediable by the State Employment Relations Board as specified in this section."

The Ohio Supreme Court's decision in *Ohio Assn. Of Public School Emp., Supra,* relieved the SERB Board of the accountability of judicial review, granted it impunity to deny its duty, and abridged the due process rights of tens of thousands of public employees as well as the rights of other parties to an unfair labor practice charge which can include the public employer and the employee organization. The abridgement of the due process rights of the public employees (a class to which this pro se appellant belongs) and the resultant depravation of liberty are the glaring failure of the Ohio Supreme Court's decision to withstand the test of constitutionality.

CONCLUSION

In the dissenting opinion of *Ohio Assn. of Pub. School Emp., Supra.* Justice Douglas writes:

> "The majority does so in order to reach its preconceived result", (15a).
>
> "Ignoring the applicable law makes it easier for the majority to reach its desired result", (15a).

The facts of this case compel the conclusion that the justices in the majority of this case knew themselves that what they were doing was wrong. Accountability must be restored to the SERB Board. The due process rights of tens of thousands of people constitute a substantial constitutional question that has been erroneously decided by the Ohio Supreme Court but has not been and should be settled by this court. Petitioner asks the court to review the Ohio Supreme Courts decision in the case of *Brown v. Kilgore, et al.*

Respectfully submitted,

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Petitioner pro se

APPENDIX

OHIO SUPREME COURT DECISION 1a
Dismissal of Unfair Labor Practice Charge 2a

Court of Common Please of
Franklin County Ohio
Decision 4a

Court of Appeals of Ohio
Tenth Appellate District
Opinion 6a

Ohio Supreme Court Opinions
In The Case Of
Ohio Association of Public
School Employees, Chapter
643 AFSCME AFL/CIO

v

Dayton City School District
Board of Education 9a

The Supreme Court of Ohio

1995 TERM

To wit: March 29, 1995

Kirk M. Brown et al., Appellants,	:	Case No. 94-2667
v.	:	ENTRY
Thaddeus Kilgore, Jr., et al., Appellees.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Kirk M. Brown.

(Franklin County Court of Appeals; No. 94APE05660)

/s/

THOMAS J. MOYER
Chief Justice

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Kirk Brown

Charging Party,

v.

Thaddeus Kilgore Jr. and the
Ohio Civil Service Employees Association, Local 11

Charged Party.

Case Number: 93-ULP-01-0019

DISMISSAL OF UNFAIR LABOR PRACTICE CHARGE

Before Chairman Owens, Vice Chairman Pottenger and Board Member Mason: October 28, 1993.

Kirk Brown (Charging Party) has filed an unfair labor practice charge against Thaddeus Kilgore Jr. and the Ohio Civil Service Employees Association, Local 11 (Charged Party). The charge alleges that the Charged Party violated Ohio Revised Code Section 4117.11(B)(1) by failing to provide contract books to bargaining unit members.

Pursuant to Ohio Revised Code Section 4117.12, the Board conducted an investigation of this charge. The investigation reveals that there is no probable cause to believe that the Charged Party has violated Ohio Revised Code Section 4117.11. The information gathered during the investigation failed to establish the probability of any unlawful interference with rights guaranteed by Ohio Revised Code §4117.03. Accordingly, the charge is dismissed.

It is so directed.

OWENS, Chairman; POTTENGER, Vice Chairman; and MASON, Board Mem' r, concur.

/s/

DONNA OWENS, CHAIRMAN

IN THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY, OHIO

CIVIL DIVISION

KIRK M. BROWN APPELLANT	:	
VS.	:	CASE NO. 93CVF12-8557
TTHADDEUS KILGORE, ET AL APPELLEES	:	JUDGE DAVID FAIS

DECISION

Rendered this 28th day of February, 1994.

FAIS, J.

This cause is before the Court upon the motions of Appellees to dismiss.

Appellees, State Employment Relations Board ("SERB"), Ohio Civil Service Employees Association ("OCSEA"), and Thaddeus Kilgore, Jr. ("Kilgore"), move to dismiss this appeal and argue this Court lacks subject matter jurisdiction. Specifically, Appellees argue SERB's decision not to issue a complaint is not reviewable by this Court under either R.C. 119 or R.C. 4117.

Appellant counters the dismissal of the unfair labor practice charge is an adjudication and therefore appealable pursuant to R.C. 119.

Appellees cite Ohio Assn. of Pub. School Emp., Chapter 643, AFSCME, AFL-CIO v. Dayton City School Dist. Bd. of Edn.(1991), 59 Ohio St. 3d 159 in support of their position. In this case the Ohio Supreme Court stated in the syllabus:

> A decision by the State Employment Relations Board whether or not to issue a complaint in an unfair labor

practice case is not reviewable pursuant to R.C. Chapter 119 or R.C. 4117.02(M) and 4117.13(D).

It is clear from the above cited case this Court lacks subject matter jurisdiction to review the decision from which Appellant appeals.

Accordingly, the Court finds the motions of Appellees to dismiss to be well-taken and hereby SUSTAINS the same. Given, this decision, all other motions are hereby rendered moot.

Counsel for Appellees shall submit the appropriate entry pursuant to court rule. Said entry shall contain in the first paragraph the name of the motion, the date upon which the motion was filed, and by whom the motion was filed.

/s/

DAVID W. FAIS, JUDGE

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Appellant pro se

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Attorney for SERB

Linda K. Fiely
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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kirk M. Brown et al., Appellants-Appellants,	:	
v.	:	No. 94APE05-660
Thaddeus Kilgore, Jr. et al., Appellees-Appellees.	:	(Regular Calendar)

OPINION

Rendered on October 25, 1994

Kirk M. Brown, pro se.

Ohio Civil Service Employees Association, and *Linda K. Fiely*, for appellee Ohio Civil Service Employees Association.

Lee Fisher, Attorney General, and *Joseph M. Oser*, for appellee State Employment Relations Board.

APPEAL from the Franklin County Court of Common Pleas.

HOLMES, J.

On November 18, 1993, petitioner, Kirk M. Brown, filed an unfair labor practice charge with the State Employment Relations Board ("SERB") against respondents Thaddeus Kilgore, Jr. and Ohio Civil Service Employees

Association ("OCSEA") In the charge, petitioner alleged that respondents had violated R.C. 4117.11(B)(1) by failing to provide contract books to bargaining unit members in a timely fashion, and thereby "restrained and/or coerced" petitioner in the exercises of his rights under R.C. Chapter 4117. SERB conducted an investigation of the charge, pursuant to R.C. 4117.12. The investigation revealed that no probable cause existed to believe that respondents violated either R.C. 4117.12 or any rights guaranteed to the petitioner by R.C. 4117.03. By its express authority, under R.C. 4117.12(B), SERB dismissed the charge for lack of probable cause.

Petitioner, claiming that R.C. 119.12 granted him the right to do so, appealed to the Franklin County Court of Common Pleas. Respondents OCSEA, Kilgore and SERB all moved to dismiss petitioner's appeal on the grounds that the common pleas court lacked subject-matter jurisdiction according to the express holding of the Ohio Supreme Court in *Ohio Assn. of Pub. School Emp. Chapter 643 AFSCME, AFL-CIO v. Dayton City School Dist. Bd. of Edn.* (1991), 59 Ohio St.3d 159, syllabus, which held that:

> "A decision by the State Employment Relations Board whether or not to issue a complaint in an unfair labor practice case is not reviewable pursuant to R.C. Chapter 119 or R.C. 4117.02(M) and 4117.13(D)."

The Franklin County Court of Common Pleas sustained respondents' motion to dismiss, and all other motions were rendered moot. *Brown* now appeals to this court to reverse the decision of the Franklin County Court of Common Pleas, arguing in his assignment of error that the decision by the Ohio Supreme Court in *Ohio Assn. of Pub. School Emp., supra,* is unconstitutional insofar as it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

We overrule appellant's single assignment of error in that the primary argument is that the respondents' reliance on *Ohio Assn. of Pub. School Emp., supra,* is invalid

because the holding of the case itself is unconstitutional. Petitioner, in his brief, bases this contention on the fact that:

> "The right to appeal granted ORC 4117.13(D) and ORC 119.12 to bargaining unit employees of the state of Ohio was recognized by the courts [long] before the Ohio Supreme Court decision in *Ohio Association of Public School Employees, Supra.*"

When the Ohio Supreme Court renders a decision, all former contrary decisions by any other court in the state, including past decisions of the Supreme Court which are specifically in conflict, are thereby superseded. *Ohio Assn. of Pub. School Emp., supra,* is the controlling authority on the issues presented herein, and as previously decided by the Supreme Court of Ohio, that opinion still is the law in the state of Ohio and is dispositive of the issue at bar. The assignment of error is therefore overruled, and the judgment of the Franklin Court of Common Pleas is hereby affirmed.

Judgment affirmed.

WHITESIDE, P.J. and PETREE, J., concur.

HOLMES, J., retired, of the Supreme Court of Ohio, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

/s/

59 Ohio St. 3d]
ASSN. OF PUB. SCHOOL EMP. *v.* BD. OF EDN.
Opinion, per H. Brown, J.

Ohio Association of Public School Employees, Chapter 643,
AFSCME/AFL-CIO, Appellant, *v.*
Dayton City School District Board of Education, Appellee.

[Cite as Ohio Assn. of Pub. School Emp., Chapter 643, AFSCME, AFL-CIO *v.* Dayton City School Dist. Bd. of Edn. (1991), 59 Ohio St. 3d 159.]

State Employment Relations Board—Decision by SERB whether to issue a complaint in an unfair labor practice case is not reviewable pursuant to R.C. Chapter 119 or R.C. 4117.02(M) and 4117.13(D).

O.Jur 3d Employment Relations §§ 442.5, 442.8
A decision by the State Employment Relations Board whether or not to issue a complaint in an unfair labor practice case is not reviewable pursuant to R.C. Chapter 119 or R.C. 4117.02(M) and 4117.13(D).

(No. 90-143—Submitted January 9, 1991—Decided May 15, 1991.)

Appeal from the Court of Appeals for Montgomery County, No. 11656.

Plaintiff-appellant, the Ohio Association of Public School Employees, Chapter 643, AFSCME/AFL-CIO ("OAPSE"), is the collective bargaining representative for paraprofessionals employed by defendant-appellee, the Dayton City School District Board of Education. On March 30, 1988, OAPSE filed an unfair labor practice charge with the State Employment Relations Board ("SERB"), alleging that the appellee had discharged Constance Wright, an OAPSE member, for her union activities in violation of R.C. 4117.11(A)(3).

Following an investigation conducted pursuant to R.C. 4117.12, SERB dismissed the unfair labor practice charge for lack of probable cause. OAPSE appealed to the Court of Common Pleas of Montgomery County, which dismissed for lack of subject matter jurisdiction. The court of appeals affirmed.

This cause is before the court pursuant to the allowance of a motion to certify the record.

Lucas, Prendergast, Albright, Gibson & Newman and *Rankin M. Gibson*, for appellant.

John F. Lenchan, for appellee.

Lee I. Fisher, attorney general, and *Joseph M. Oser*, urging affirmance for *amicus curiae*, State Employment Relations Board.

H. Brown, J. For the reasons which follow, we conclude that a determination by the State Employment Relations Board as to whether to prosecute an unfair labor practice charge is not an adjudication, and affirm the judgment of the court below.

R.C. 4117.11 designates certain acts by employers or employee representatives as unfair labor practices which may be remedied by SERB. R.C. 4117.12(A), R.C. 4117.12(B) provides the means by which the prohibitions of R.C. 4117.11 may be enforced. Any person may file a charge with SERB. Once a charge is filed, "*** the board [SERB] or its designated agent shall investigate the charge. If the board has probable cause for believing that a violation has occurred, the board shall issue a complaint and shall conduct a hearing concerning the charge ***" to adjudicate whether an unfair labor practice has in fact occurred.

Quasi-judicial adjudications by SERB are, of course, subject to judicial review pursuant to R.C. Chapter 119 and R.C. 4117.02(M). *South Community, Inc.* v. *State Emp. Relations Bd.* (1988), 38 Ohio St. 3d 224, 527 N.E. 2d 864, syllabus. R.C. 4117.13 also specifically provides for judicial enforcement and review of unfair labor practice adjudication. However, SERB's investigation and evaluation of an unfair labor practice charge filed by a private party are clearly not

an adjudication. *Ohio Assn. of Pub. School Emp.* v. *Cleveland Bd. of Edn.* (1987), 37 Ohio App. 3d 126, 524 N.E. 2d 532. Before a complaint is issued, "*** there is no requirement for notice, hearing, and the opportunity for introduction of evidence." *M.J. Kelley Co.* v. *Cleveland* (1972), 32 Ohio St. 2d 150, 61 O.O. 2d 394, 290 N.E. 2d 562, paragraph two of the syllabus. Because there has been no hearing, there is no record to be filed with the reviewing court as required by R.C. 4117.13(A) and (D). The only record of SERB's investigation is its investigatory file, which is confidential. See *Franklin Cty. Bd. of Commrs.* v. *State Emp. Relations Bd.* (Feb. 3, 1988), Franklin C.P. No. 87CV-12-8196, unreported (reprinted in 1988 SERB 4-16). SERB's role in this early stage of the proceeding is most closely analogous to that of a public prosecutor investigating a citizen's complaint of criminal activity. In either case, the decision not to prosecute is discretionary, and not generally subject to judicial review. *State, ex rel. Murr,* v. *Meyer* (1987), 34 Ohio St. 3d 46, 516 N.E. 2d 234.

Nor is there a private right to enforce the unfair labor practice provisions of R.C. 4117.11 without the participation of SERB. "The unfair labor practices listed in *** [R.C.] 4117.11 are the vehicles for each opposing side to challenge the other, through the intervention of the Board. But as much as they seem to be private grounds for attack, they are public in nature. The concept is a public right, where privately initiated complaints are carried through to a decision at public expense, with the state vindicating the private persons' rights through public proceedings." (Footnotes omitted.) O'Reilly, Ohio Public Employee Collective Bargaining (1984) 51-52, Section 9.01; see, also, *Franklin Cty. Law Enforcement Assn.* v. *Fraternal Order of Police, Capital City Lodge No. 9* (1991), 59 Ohio St. 3d 167, 572 N.E. 2d 87, decided this day.

Nevertheless, the dissent mistakenly asserts that R.C. 4117.13(D) subjects probable cause determinations to judicial review. As is clear from a review of the statute as a whole, R.C. 4117.13 applies only to the enforcement and review of SERB's final order resulting from an adjudication on the merits of an unfair labor practice case. It does not grant this

right to appeal quasi-prosecutorial determinations to proceed or not proceed with unfair labor practice complaints. The language granting a right of appeal to "[a]ny person aggrieved by any final order *** denying *** the relief sought ***," upon which the dissent so heavily relies, is intended to allow the charging party to appeal where SERB, after a full hearing, finds that an unfair labor practice has not been committed. A probable cause determination is not a final order resulting from an adjudication on the merits of an unfair labor practice case. One must mangle the plain wording of the statute in question in order to effect the "public policy" which the dissent wants to implement.[1]

It is worthwhile to compare R.C. 4117.13(D) to 4112.06(A), which governs judicial review of actions by the Ohio Civil Rights Commission. The commission's role in unlawful discrimination cases is analogous to SERB's role in unfair labor practice cases. The commission investigates citizen complaints and issues a complaint if it finds probable cause that unlawful discrimination has occurred. R.C. 4112.05(B). R.C. 4112.06(A) grants a right of appeal to anyone "*** aggrieved by a final order of the commission, *including a refusal to issue a complaint* ***." (Emphasis added.) If the commission's probable cause determinations were "final orders" as that term is generally used, the General Assembly would not have needed to add the emphasized language to subject these determinations to judicial review. Conversely, the fact that no such language appears in R.C. 4117.13(D) evinces a clear intent to treat SERB's probable cause determinations differently—to make them *not* subject to judicial review.

The General Assembly has made its intent known in plain and unambiguous terms, and we have no power to "construe" the statute to reach a different result. *Sears* v. *Weimer* (1944), 143 Ohio St. 312, 28 O.O. 270, 55 N.E. 2d 413, paragraph five of the syllabus; see, also, *Cleveland Trust Co.* v. *Eaton* (1970), 21 Ohio St. 2d 129, 138, 50 O.O. 2d 354, 359, 256 N.E. 2d 198, 204; *Slingluff* v. *Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574.

We also note that the procedures for unfair labor practice cases mandated by R.C. 4117.12 and 4117.13 are

substantively identical to those established in Section 10 of the National Labor Relations Act to govern unfair labor practice cases before the National Labor Relations Board. Section 160, Title 29, U.S. Code. It has long been established that a decision by the NLRB's General Counsel not to issue an unfair labor practice complaint is not reviewable by the courts. *George Banta Co.* v. *Natl. Labor Relations Bd.* (C.A.4, 1980), 626 F. 2d 354.

Accordingly, we hold that a decision by SERB whether or not to issue a complaint in an unfair labor practice case is not reviewable pursuant to R.C. Chapter 119 or R.C. 4117.02(M) and 4117.13(D). The judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., HOLMES AND WRIGHT, J.J., concur

RESNICK, J., concurs separately.

SWEENEY and DOUGLAS, JJ., dissent.

ALICE ROBIE RESNICK, J., concurring. I concur in the majority opinion but write separately. Our entire government is established on a system of checks and balances. This fact is true of all governmental bodies. However, there is no review pursuant to R.C. 4117.02 when the State Employment Relations Board, composed of three individuals, finds no probable cause as to whether to prosecute an unfair labor practice claim.

As stated by the majority, "*** the process of investigating and evaluating an unfair labor practice charge filed by a private party is clearly not a quasi-judicial adjudication." The Eighth Appellate District in *Boieru* v. *State Emp. Relations Bd.* (1988), 54 Ohio App. 3d 23, 27, 560 N.E. 2d 801, 806, has noted that "[t]he decision to prosecute or not to prosecute a[n] [unfair labor practice] claim is a purely executory and nonjudicial function." This is apparent from the fact that no hearing or notices are required.

A non-judicial function cannot be made into a final appealable order under R.C. 2505.02. All that took place in this matter was an investigation, which is ministerial rather than quasi-judicial. Under R.C. 119.06, in order for an adjudication order to be valid, a hearing must be afforded in accordance with R.C. 119.01 to 119.13. R.C. 4117.02 has no provision for an adjudication hearing prior to the board's making its initial probable cause determination.

In order to hold that this initial decision finding no probable cause is a final appealable order, this court would have to redraft R.C. 4117.02. It is not the function of this court to legislate. However, I strongly recommend that the General Assembly review R.C. 4117.02 to decide whether it is advisable to entrust unbridled discretion in a three-member board to determine whether probable cause exists to prosecute an unfair labor practice charge. I believe it is advisable that these decisions be reviewed, otherwise excessive authority is held by one agency. To be true to the system of checks and balances by which our government operates, R.C. 4117.02 should be legislatively amended.

DOUGLAS, J., dissenting. Because the majority is fundamentally wrong on the facts, on the law, and on the public policy which this case impacts, I must respectfully dissent.

The facts and procedural posture of this case are not complicated.

On November 9, 1987, Constance D. Wright was hired by appellee, Dayton City School District Board of Education. Wright was assigned to work as an instructional aide for fifth-grade teachers. As a paraprofessional, Wright became associated with the Ohio Association of Public School Employees, Chapter 643, AFSCME/AFL-CIO, appellant herein, which represents board of education paraprofessionals.

Wright alleges that she is the sister of Mary Manuel who has been president of Chapter 643 for fourteen years. Apparently, arising out of her duties as president of Chapter 643, there is some animosity surrounding Manuel. Manuel had instructed Wright not to tell anyone that they (Manuel

and Wright) were sisters because the animosity toward Manuel might work against Wright.

Inadvertently, Wright disclosed her relationship with Manuel and, shortly thereafter, Wright's employment was terminated. This occurred after Wright had been told by the principal of her school that he was satisfied with her work and that he had "no complaints."

Based upon these facts and other information obtained by appellant, appellant filed an unfair labor practice ("ULP") charge with the State Employment Relations Board ("SERB"). Appellant alleged a violation of R.C. 4117.11(A)(1) and (3). Subsequently, SERB dismissed the charge, finding "*** no probable cause to believe that the Charged Party has violated Ohio Revised Code Section 4117.11."

From SERB's order, appellant appealed to the Common Pleas Court of Montgomery County. That court dismissed the appeal for lack of subject matter jurisdiction. Upon further appeal, the court of appeals affirmed the judgment of the trial court and specifically found that the General Assembly did not intend that SERB's determination of lack of probable cause should be a final appealable order under R.C. 4117.13(D). The matter is now before this court for final determination.

I

R.C. Chapter 119

The appeal before us is brought to this court (and the lower courts) upon the authority of R.C. Chapter 4117. There is no indication that appellant invokes the provisions of R.C. Chapter 119, notwithstanding what is found in the syllabus and the body of the majority opinion.

The majority premises its holding on the basis of the terms "adjudicate" and "quasi-judicial adjudication." The majority does so in order to reach its preconceived result. The term "adjudication" is found in R.C. 119.12—but is not found in R.C. Chapter 4117 and specifically R.C.

4117.13(D), the section of the Revised Code upon which appellant based its appeal.

II

R.C. Chapter 4117 and Specifically
R.C. 4117.13(D)

The majority opinion completely avoids citing or discussing R.C. 4117.13(D).[2] I suspect this is for a good reason. If the majority were to review and decide this case on the basis of the self-contained law governing unfair labor practices (R.C. 4117.12 and 4117.13) then, I believe, the majority would be inexorably driven to a different conclusion. Ignoring the applicable law makes it easier for the majority to reach its desired result.

In pertinent part, R.C. 4117.13(D) provides that "[a]ny person aggrieved by any *final order* of the board granting or *denying,* in whole or in part, the relief sought [unfair labor practice finding] may appeal to the court of common pleas of any county where the unfair labor practice in question was *alleged* to have been engaged in *** by filing in the court a notice of appeal setting forth the order appealed from and the grounds of appeal ***.

"The court has exclusive jurisdiction to *** make and enter a decree enforcing, modifying, and enforcing as so modified, *or setting aside in whole or in part the order of the board.* ***" (Emphasis added.)

The statute is clear. *Any* final order of the board *denying* the relief sought may be appealed to the court of common pleas. Further, the statute does *not* say that an appeal may only be taken from an adjudication that a ULP was committed. The statute says the appeal may be filed in any county where the ULP is *alleged* to have been engaged in. Certainly, in using the word "alleged," the General Assembly could not have been contemplating a ULP which had already been determined to have occurred. No explanation should be needed as to the word "alleged." We all use the term enough to know what we mean—and what it means.

It also must be noted that in the same section the General Assembly provided for enforcing or modifying, by the court, a finding of a ULP. However, the General Assembly then went on and by the use of the conjunctive word "or" provided for the setting aside of the *order* of the board—not just an adjudication or finding that a ULP had occurred.

This brings us then to the question of a "final order." There are three prongs to what is a "final order" as provided for in R.C. 2505.02.[3] If *any* prong is satisfied, then the order is a "final order." An action of SERB denying (or granting) a ULP charge fits into both prongs one and two of R.C. 2505.02.

It is clear that the dismissing for lack of probable cause of an alleged ULP affects a substantial right of a complaining party. Further, such an action by SERB effectively determines the action and prevents a judgment from being obtained by the complainant. Thus, all the requirements of the first prong are met and SERB's order is "final."

Likewise is the second prong met. Again, a complaining party's substantial right has been affected. Further, the order is made in a special proceeding. A "special proceeding" has been discussed by this court in numerous decisions, and I have expressed my views in *Stewart* v. *Midwestern Indemn. Co.* (1989), 45 Ohio St. 3d 124, 128, 543 N.E. 2d 1200, 1204 (Douglas, J., dissenting); *Dayton Women's Health Ctr.* v. *Enix* (1990), 52 Ohio St. 3d 67, 72, 555 N.E. 2d 956, 960 (Douglas, J., dissenting). Accordingly, the second prong of R.C. 2505.02 is also met.

Thus, we have specific statutory authority for appealing a final order of SERB which denies, in whole or in part, the relief sought when bringing a ULP charge.

III

Two arguments are made as to why an order of SERB finding no probable cause for a ULP charge should not be appealable to the court. It is contended that a finding that such orders were appealable would require SERB to

hold formal hearings on every ULP charge filing. It is further contended that permitting appeals of SERB's dismissals of ULP charges would open the "floodgates" of appeal.

Neither contention is correct. Upon the filing of a ULP charge, SERB assigns an investigator to interview and take statements from each of the parties and their witnesses. A report is then made to SERB. If SERB, based upon the evidence received and the report of its investigator, finds no probable cause then SERB has the authority, pursuant to R.C. 4117.2(B)(3), to dismiss the complaint. No formal hearing, notice, etc. are required, any more than it is required when trial courts dismiss cases pursuant to Civ. R. 12(B)(6) or grant judgment pursuant to Civ. R. 56. Furthermore, as to the "floodgates" theory, cases appealed could be summarily dismissed pursuant to R.C. 4117.13(D) if the findings of SERB as to the facts are supported by substantial evidence. If the factual findings of SERB are so supported, then the findings are conclusive.

Further protections are provided against the filing of frivolous ULP charges and the filing of sham pleadings and frivolous appeals. See R.C. 4117.12(B), App. R. 23 and Civ. R. 11.

The bottom line is that there should be judicial review of orders of SERB dismissing ULP charges on the basis of no probable cause, in the unlikely event that SERB makes a clearly erroneous and arbitrary decision. R.C. 4117.13(D) clearly provides for such appeal and common sense militates for such a holding. This is so until and unless this court holds that mandamus would be a proper remedy to challenge an abuse of discretion by SERB in ULP charge cases.

The majority should be reminded that this sharpened sword it fashions today can cut both ways. As an example, R.C. 4117.11(B)(8) makes it an unfair labor practice for an employee organization to "[e]ngage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action. ***" Where an employee organization violates this provision, thereby causing the employer irreparable

damage, and the employer files a ULP charge but a predisposed board dismisses for want of probable cause even though the violation is clear, would the majority hold that the employer has no right of judicial review? I would hope not—and so did the General Assembly by providing the clear language found in R.C. 4117.13(D).

Because I believe that the majority is just plain wrong in its rationale and pronouncements, I must vigorously, but respectfully, dissent.

SWEENY, J., concurs in the foregoing dissenting opinion.

ENDNOTES:

[1]Given that the General Assembly has made a clear policy choice which we are compelled to respect, the dissent's comments are more properly directed to that body. However, we do note that there are several reasons why it would not necessarily be desirable from a public policy standpoint to adopt the dissent's interpretation of R.C. Chapter 4117.

For instance, one party to a labor dispute (be it the employer, the collective bargaining representative, or a rival union) might file a series of unfounded, but colorable, unfair labor practice charges against its opposition as a means of harassment. When SERB dismisses these charges for lack of probable cause, the charging party could, under the dissent's interpretation, extend the harassment through two appeals of right, to the court of common pleas and the court of appeals, and a possible discretionary appeal to this court, forcing the charged party to expend time and money in court defending its interests. The danger is particularly acute where the charging party is much stronger, financially, than the charged party—a situation which could easily occur when the charging party is an employer and the charged party is a newly formed employee organization. While financial sanctions would perhaps ultimately be available under R.C. 4117.12(B), Civ. R. 11, or App. R. 23, they might come too late to prevent the charging party from securing an unfair and unwarranted advantage in an organizational campaign or in bargaining.

Further, if a finding that probable cause *does* exist were also deemed appealable, this would permit a charged party which is guilty of unfair labor practices to delay remedial action by SERB for the duration of the appeal process.

[2]Subsequent to this dissent being written, the majority opinion was amended to include a discussion of R.C. 4117.13. The majority opinion now addresses the dissenting opinion in some detail and because of this, at best, unusual procedure (discussion of a dissenting opinion in a majority opinion), I find it necessary to leave the dissenting opinion intact as originally written.

In its discussion, the majority finds that R.C. 4117.13 is inapplicable to the case at bar since, according to the majority, "*** R.C. 4117.13 applies only to the enforcement and review of SERB's final order resulting from an *adjudication* on the merits of an unfair labor practice case.***" (Emphasis added.) The majority also states that "R.C. 4117.13 *** specifically provides for judicial enforcement and review of unfair labor practice *adjudications*. ***" (Emphasis added.)

Therein lies, at least in part, the majority's confusion. The majority's sleight of hand will pass to a reader with little or no knowledge of the Public Employees' Collective Bargaining Act, but it cannot pass to anyone who reads the Act with understanding and quickly observes that the term "adjudication" is not found in R.C. Chapter 4117 and, specifically, that it is *not* found in R.C. 4117.13(D). The term "adjudication" *is* found in R.C. 119.12, whereas in R.C. 4117.13(D), the term used is "final order." There is a difference, and there is meant to be, between an appeal brought pursuant to R.C. Chapter 119 and an appeal brought pursuant to R.C. 4117.13(D).

Further, it will be noted that the majority, by the adroit use of ellipses, conveniently leaves out part of the verbiage of R.C. 4117.13(D). Among others, the words "in whole or in part" and the word "alleged" are omitted by the majority, as is any discussion by the majority of this language. This seems a bit strange given the following quote from the majority opinion in *Ford Motor Co.* v. *Ohio Bur.*

of Emp. Serv. (1991), 59 Ohio St. 3d 188, 190, 571 N.E. 2d 727, 729:

"'The presumption always is, that every word in a statute is designed to have *some* effect, and hence the rule that, "in putting a construction upon any statute, every part shall be regarded, and it shall be so expounded, if practicable, as to give some effect to *every part of it.*" ' (Emphasis *sic.*) *Turley* v. *Turley* (1860), 11 Ohio St. 173, 179 (citing *Commonwealth* v. *Alger* [Mass. 1851], 7 Cush. 53, 89); see, also, R.C. 1.47(B) ('In enacting a statute, it is presumed that *** [t]he entire statute is intended to be effective ***.')."

Likewise, in *Cleveland Elec. Illum. Co.* v. *Cleveland* (1988), 37 Ohio St. 3d 50, 524 N.E. 2d 441, we held at paragraph three of the syllabus: "In matters of construction, it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used. ***"

The appropriate full context of R.C. 4117.13(D) is as set forth in the body of this dissenting opinion. The words used are
significant and when read in context with the other parts of the section, it is clear what the General Assembly meant.

Finally, it is curious to read the reasoning of the majority in {endnote} 1 with regard to their concern for possible "harassment" through the use of appeals. While this deathbed conversion is welcome—it is just a little late. Given that a majority of this court, in *South Community, Inc.* v. *State Emp. Relations Bd.* (1988), 38 Ohio St. 3d 224, 527 N.E. 2d 864, has authorized the appeal of a SERB order certifying an exclusive bargaining agent, the words of the majority herein, in {endnote} 1, that "[t]he danger is particularly acute where the charging party is much stronger, financially, than the charged party—a situation which could easily occur when the charging party is an employer and the charged party is a newly formed employee organization" ring hollow, indeed.

[3]R.C. 2505.02 provides in pertinent part:

"[1] An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, [2] an order that affects a substantial right made

in a special proceeding or upon a summary application in an action after judgment, or [3] an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial."

Supreme Court, U.S.
FILED
JUL 25 1995
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No. 95-3

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

KIRK M. BROWN,
Petitioner,

v.

THADDEUS KILGORE, JR.,
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION,
AFSCME,
LOCAL 11, AFL-CIO, AND
STATE EMPLOYMENT RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to
the Supreme Court of Ohio

RESPONDENT STATE EMPLOYMENT RELATIONS BOARD'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner asks this Court to review a decision of the Supreme Court of Ohio which holds that a determination by Respondent State Employment Relations Board [hereinafter SERB] to dismiss an unfair labor practice charge for lack of probable cause is not reviewable on appeal pursuant to Ohio Rev. Code Ann. Ch. 119 or Ohio Rev. Code Ann. §§ 4117.02(M) and 4117.13(D). *See Ohio Ass'n of Pub. School Employees, Chapter 643, AFSCME, AFL-CIO v. Dayton City School Dist. Bd. of Educ.*, 59 Ohio St. 3d 159, 161, 572 N.E.2d 80, 83 (1991) [hereinafter *Dayton*]. The Ohio courts relied on the *Dayton* decision to determine that there is no right to judicial review of such determination in the instant case.

Petitioner filed an unfair labor practice charge with SERB alleging that Respondents Thaddeus Kilgore, Jr. and Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO committed certain unfair labor practices. SERB investigated the charge pursuant to Ohio Rev. Code Ann. § 4117.12(B). Under that statute, SERB is empowered to issue a complaint and prosecute a case only if it finds that there is probable cause of a violation of Ohio Rev. Code Ann. § 4117.11. In the instant case, SERB determined that there was no probable cause and thus did not issue a complaint. Consequently, SERB dismissed the unfair labor practice charge. Petitioner appealed SERB's determination through two lower Ohio courts and the Supreme Court of Ohio. Each court rejected Petitioner's argument.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision Below Does Not Conflict With Any Decision Of This Court Or Any United States Circuit Court Of Appeals.

The Supreme Court of Ohio noted in its *Dayton* decision "that the procedures for unfair labor practice cases mandated by R.C. 4117.12 and 4117.13 are substantively identical to those established in Section 10 of the National Labor Relations Act to govern unfair labor practice cases before the National Labor Relations Board." *Dayton*, 59 Ohio St. 3d at 161, 572 N.E.2d at 83. A decision by the General Counsel of the National Labor Relations Board [hereinafter NLRB] to not prosecute is not reviewable by the NLRB or a court. *See George Banta Co., Inc. v. N.L.R.B.*, 626 F.2d 354, 356 (4th Cir. 1980). This Court and all of the United States Circuit Courts of Appeals that have addressed the issue of judicial review in the instant context have uniformly held that the absence of a right of appeal from a decision not to issue an unfair labor practice complaint does not violate the Due Process Clause of the United States Constitution.[1]

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[1] *See N.L.R.B. v. United Food & Commercial Workers Union*, 484 U.S. 112, 122, 108 S. Ct. 413, 420, 98 L. Ed. 2d 429 (1987); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39, 95 S. Ct. 1504, 1510-11, 44 L. Ed. 2d 29 (1975); *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 912, 17 L. Ed. 2d 842 (1967); *District Lodge 64, Int'l Ass'n of Machinists v. N.L.R.B.*, 949 F.2d 441, 446 n.1 (D.C. Cir. 1991); *Jackman v. N.L.R.B.*, 784 F.2d 759, 764 (6th Cir. 1986); *Int'l Ass'n of Machinists, Etc. v. Lubbers*, 681 F.2d 598, 602-03 (9th Cir. 1982); *Pacific Southwest Airlines v. N.L.R.B.*, 611 F.2d 1309, 1311 (9th Cir. 1980); *Associated Builders & Contractors, Inc. v. Irving*, 610 F.2d 1221, 1225, (4th Cir. 1979), *cert. denied sub nom. Associated Builders*

The NLRB has been operating under this administrative scheme, one that is substantively identical to SERB's, for over fifty years. Because of the similarity of the SERB and NLRB processes, it is clear that the absence of any right to judicial review of SERB's dismissal of an unfair labor practice charge for lack of probable cause does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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v. Lubbers, 446 U.S. 965, 100 S. Ct. 2941, 64 L. Ed. 2d 823 (1980); *Bays v. Miller*, 524 F.2d 631, 634 (9th Cir. 1975); *Hernandez v. N.L.R.B.*, 505 F.2d 119, 120 (5th Cir. 1974); *Int'l Ladies' Garment Workers Union v. N.L.R.B.*, 501 F.2d 823, 830 (D.C. Cir. 1974); *Newspaper Guild, Erie Newspaper Guild v. N.L.R.B.*, 489 F.2d 416, 425 (3d Cir. 1973); *Saez v. Goslee*, 463 F.2d 214 (1st Cir.), *cert. denied*, 409 U.S. 1024, 92 S. Ct. 466, 34 L. Ed. 2d 316 (1972); *N.L.R.B. v. Int'l Bhd. of Elec. Workers, Local 357*, 445 F.2d 1015, 1016 (9th Cir. 1971); *Mayer v. Ordman*, 391 F.2d 889, 889-90 (6th Cir.), *cert. denied*, 393 U.S. 925, 89 S. Ct. 257, 21 L. Ed. 2d 261 (1968); *Balanyi v. Local 1031, Int'l Bhd. of Elec. Workers*, 374 F.2d 723, 725-26 (7th Cir. 1967); *United Elec. Contractors Ass'n v. Ordman*, 366 F.2d 776, 776 (2d Cir.), *cert. denied*, 385 U.S. 1026, 87 S. Ct. 753, 17 L. Ed. 2d 674 (1966); Wellington Mill Div., West Point Mfg. Co. v. N.L.R.B., 330 F.2d 579, 590-91 (4th Cir.), *cert. denied*, 379 U.S. 882, 85 S. Ct. 144, 13 L. Ed. 2d 88 (1964); *Division 1267, Amalgamated Ass'n of Street, Elec. Ry., & Motor Coach Employees v. Ordman*, 320 F.2d 729, 730 (D.C. Cir. 1963); *General Drivers, Local 886 v. N.L.R.B.*, 179 F.2d 492, 494-95 (10th Cir. 1950). *Cf. Int'l Bhd. of Boilermakers, Local 6 v. N.L.R.B.*, 872 F.2d 331, 332 (9th Cir. 1989)("[I]f General Counsel's decision to withdraw his complaint was an act of 'prosecutorial discretion,' there is no opportunity for judicial review.").

II. The Petition Does Not Present A Substantial Federal Constitutional Question.

Petitioner contends, without citing any relevant cases, that his constitutional rights have been abridged because of the absence of a right of judicial review. However, in the context of this case, he has no private right to enforce the unfair labor practice provisions established by Ohio Rev. Code Ann. § 4117.11 without the participation of SERB. Under Ohio's statutory format, the rights at issue in these proceedings are public in nature. When a complaint is filed by SERB, the case is prosecuted at public expense in the name of the state. Any remedy or right ultimately accruing to the benefit of a private person is akin to the notion of a third party beneficiary. Thus, SERB's decision not to prosecute does not determine any private rights of any specified person since SERB's actions are on behalf of the public and not any specified person. In further explaining its conclusion that there is no right of appeal from SERB's decision not to issue a complaint, the Supreme Court of Ohio also noted that the Ohio General Assembly "has made its intent known in plain and unambiguous terms [to make such SERB determinations *not* subject to judicial review], and we have no power to 'construe' the statute to reach a different result." *Dayton*, 59 Ohio St. 3d at 161, 572 N.E.2d at 83.

When pursuing statutory remedies, it is hornbook law that there is no inherent or constitutional right of appeal[2] and

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[2] *Cf. Railroad Co. v. Grant*, 98 U.S. 398, 401, 25 L. Ed. 231 (1879)("[A] party to a suit has no vested right to an appeal or a writ of error from one court to another.")

that any such right exists only if provided by statute.[3] Because the Petitioner has presented no substantial (or even colorable) federal constitutional question, his petition for writ of certiorari should be denied.

III. The Issues Presented In The Petition Are Issues Of State Law That Have Been Fairly, Properly, And Recently Decided With Clarity By The Supreme Court Of Ohio.

Petitioner's unfair labor practice charge was brought pursuant to state law. *See* Ohio Rev. Code Ann. § 4117.12(B) (Anderson 1991). The Supreme Court of Ohio's thorough and well-reasoned opinion in *Dayton* fairly and properly addressed the issues raised in the instant petition. That decision comports with a long line of federal case law examining analogous NLRB procedures. Therefore, the Supreme Court of Ohio's recent *Dayton* and *OAPSE* decisions should not be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Ohio should be denied.

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[3] This Court should also note that, while no right of appeal is provided by statute, the Petitioner is not without remedy. In *State ex. rel. Ohio Assn. of Pub. School Employees/AFSCME, AFL-CIO v. State Employment Relations Bd.*, 64 Ohio St. 3d 149, 153, 593 N.E.2d 288, 292 (1992) [hereinafter *OAPSE*], the Supreme Court of Ohio reaffirmed its *Dayton* holding, but went on to rule that judicial review of a SERB determination is available via an action in mandamus.

Respectfully submitted,

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July 26, 1995

(3)

Supreme Court, U. S.
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NO. 95-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KIRK M. BROWN
PETITIONER,

v.

THADDEUS KILGORE, JR.
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11 AFSCME/AFL CIO
STATE EMPLOYMENT RELATIONS BOARD,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

REPLY BRIEF OF PETITIONER

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6 pp

INTRODUCTION

This reply brief will address both the brief in opposition of Respondent State Employment Relations Board and the brief in opposition of Respondents Kilgore and Ohio Civil Service Employees Assoc.(O.C.S.E.A.).

THE ARGUMENT OF THE PETITIONER STANDS UNREFUTED. THE ARGUMENT OF THE RESPONDENTS IS NOT RELEVANT. THE ARGUMENT OF THE RESPONDENTS IS NOT WELL TAKEN AND CONTAINS MISSTATEMENTS OF FACT AND LAW

I. THE ARGUMENT OF THE PETITIONER STANDS UNREFUTED

The petitioner has shown that the duly passed laws of Ohio provide for the right to appeal a dismissal by the State Employment Relations Board (SERB Board) of an unfair labor practice charge for lack of probable cause (petition pg. 11-13). The respondents Have failed to address or refute this fact.

The petitioner has shown that the Ohio Supreme Court's decision in the case of *Ohio Assn.of Pub. School Emp. Chapter 643, AFSCME AFL-CIO v. Dayton City School Dist. Bd. Of Edn.*((1991),59 Ohio St. 3d 159) (hereinafter *OAPSE*) is repugnant to the duly passed laws of Ohio (petition pg. 10-15). The respondents have failed to address or refute this fact.

The petitioner has shown that the decision in *OAPSE* is precluded by the 14th Amendment to the Constitution of the United States (petition pg. 11-15). The respondents have failed to address or refite this fact as well.

U.S. Supreme Court rule 15 admonishes the respondents that they have an obligation to the court to point out any misstatements of fact or law set fourth in the petition. The respondent's briefs in opposition address no such perceived

misstatements. Averments are admitted when not denied pursuant to Federal Rule of Civil Procedure 8(d).

In the absence of any argument on the part of the respondents that addresses and refutes the clear argument of the petitioner, it is hereby respectfully submitted that this court should find that the argument in favor of granting Certiorari is well taken and stands unrefuted.

II. THE ARGUMENT OF THE RESPONDENTS IS NOT RELEVANT TO THE QUESTIONS PRESENTED FOR REVIEW OR TO THE ISSUES RAISED BY THE PETITIONER

The authorities that are relevant in this case are presented in the petition pursuant to Rule 14.1 (c) and (f). Respondent SERB at pages 2 and 3 and Respondents Kilgore and O.C.S.E.A. at pages 2-5 offer the argument that in a matter before the National Labor Relations Board (N.L.R.B.), a decision not to prosecute is not reviewable by a court. This argument ignores the applicable law in this case.

III. THE ARGUMENTS OF RESPONDENTS ARE NOT WELL TAKEN AND CONTAIN MISSTATEMENTS OF FACT AND LAW

The reliance by the respondents on the N.L.R.B.'s unreviewable discretion in the "instant context" (brief of SERB at page 2) is contrary to the holding of this court in the case of *Vaca v. Sipes* ((1967) 386 U.S. 171,17 L Ed 2d 842, 87 S. Ct. 903) where at pages 852-857 the Garmon pre-emption doctrine (Which gives the N.L.R.B. exclusive jurisdiction) is rendered inapplicable to a suit alleging a breach of a unions duty of fair representation. The case at bar also alleges a violation of the duty of fair representation on the part of the union and the chapter president as prohibited by Ohio Revised Code Chapter

4117.11 (B) (1). Therefore, the respondents reliance on a comparison to the N.L.R.B. is not well taken and the comparison actually supports the contention of the petitioner.

The statement of the case adopted by the respondents omits the fact that the Ohio Supreme Court denied the petitioner an appeal of right (petition page 10). It also obscures the facts of the case by referring to the case of *Ohio Assn. Of Pub. School Emp.,chapter 643, AFSCME, AFL-CIO v. Dayton City School Dist. Bd. Of Edn.* As *"Dayton"* (the appellee). The duty of the SERB Board to issue a complaint if it has probable cause is explained by the respondents as a restraint on the board unless it finds probable cause.

Respondent SERB at page 2 refers to"This Court and all of the United States Circuit Courts of Appeals that wave addressed the issue of Judicial Review in the instant context".However the issue of judicial review in the present case involves only the Ohio Public Employee Collective Bargaining Law (Ohio Revised Code Ch. 4117) and also Ohio's Administrative Procedure Act (O.R.C. Ch. 119). The issue of judicial review in the instant context has not been addressed by this court as respondent SERB claims.

Respondent SERB also refers to "the absence of any right to judicial review of SERB's dismissal of an unfair labor practice charge for lack of probable cause"(page 3), and to hornbook law that "any such rights exist only if provided by statute"(page 4 and 5). Petitioner counters that there is no "absence" of any right to judicial review in this case and that these rights are provided with redundancy in two of the duly passed statutes of Ohio (petition page 4-6 and 11-14).

Respondent SERB states on page 5 that the issues presented in the petition are issues that have been fairly, properly, and recently decided with clarity by the Supreme Court of Ohio. This statement is not true. The Ohio Supreme Court in *OAPSE* considered Ohio Revised Code Ch. 4117 only. It did not consider Ch. 119 (see dissenting opinion of Ohio Supreme Court Justice Douglass (petition page 15a "R.C. Chapter 119"). It also did not consider the 14th Amendment to the Constitution of the United States.

Respondent SERB argues at page 4 that the petition does not present a substantial federal constitutional question. The "absence" of a right of judicial review is referred to in a misstatement of petitioners argument. It is claimed that SERB's decision not to prosecute does not determine any private rights of any specified person. Petitioner counters that Question Presented No. II is a substantial federal question, and the argument in the petition from page 10 to 15 is an unrefuted argument regarding the substantial constitutional rights of tens of thousands of people in Ohio alone. The private rights of parties who come to the SERB Board are cited in this reply brief at page 3 and in the petition at page 4-6 and 11-14.

Respondents Kilgore and O.C.S.E.A. also claim at page 1 that no important question of federal law exists in this case which warrants review. This is also an unsubstantiated claim (see above).

CONCLUSION

There has been no sound argument to address and refute the argument for granting certiorari in this case. The arguments offered by the respondents are irrelevant to the issues of the case and are rife with errors.

The Ohio Supreme Court has disregarded the duly passed laws of the State of Ohio and the system of Checks and Balances in fashioning an inadequacy of remedies at law for this petitioner and tens of thousands of people in Ohio who serve the public.

The SERB Board is an untouchable state agency with exclusive jurisdiction and impunity to "not find" probable cause if it doesn't want to. This was not the intent of the General Assembly of Ohio when it created the SERB Board.

Petitioner respectfully submits that this case is worthy of this courts jurisdiction and that a summary judgement on the merits is appropriate in this case.

Respectfully submitted

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(4)

Supreme Court, U.S.
FILED
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No. 95-8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

KIRK M. BROWN,

Petitioner,

v.

THADDEUS KILGORE, JR.;
OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION,
AFSCME LOCAL 11, AFL-CIO; and
STATE EMPLOYMENT RELATIONS BOARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENTS KILGORE AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION'S BRIEF IN OPPOSITION

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INTRODUCTION

The citations to the opinions below and the basis for this Court's jurisdiction are correctly set forth in the petition for the writ of certiorari at p. 2. Respondents Kilgore and Ohio Civil Service Employees Association accept the Statement of the Case as presented by Respondent State Employment Relations Board in its Brief in Opposition at p. 1.

REASONS THE PETITION SHOULD BE DENIED

Supreme Court Rule 10 sets forth several considerations that this Court considers in deciding to grant a writ of certiorari. No such consideration exists in the instant case. To the best of our knowledge, there exists no conflict between the decision reached by the Supreme Court of Ohio and any other state court of last resort or any federal circuit court. Nor can we discern any conflict with any decision of this Court. Nor, finally, do we feel that the issue presented here is of such importance that this Court needs to address it.

1. No important question of federal law exists in this case which warrants review.

Petitioner presents this Court with no justification for its granting the writ besides an admonition that the Supreme Court of Ohio's justification for dismissal of petitioner's appeal, *i.e.*, its reliance upon a previous decision, "constitute[d] a decision of an important question of federal law which has not been, but should be decided by this [C]ourt." Pet. at 11. Petitioner does not, however, explain why this case or the issue implicated are so important as to warrant this Court granting certiorari. A citation is provided to *R.J. Reynolds Tobacco Co. v. Durham*

County, 479 U.S. 130 (1986), but that case, which concerned the imposition of an *ad valorem* tax upon imported tobacco products stored in a customs warehouse, bears no relevance to the instant facts.

Part of this Court's opinion in *R.J. Reynolds* stated that a party may seek review in this Court from a decision of an inferior state court denying review from an inferior state court for want of a substantial constitutional question. Finding that a state statute had been upheld against federal constitutional challenge, this Court found that jurisdiction lay for an appeal to this Court under 28 U.S.C. Section 1257(2), as the denial of review by the highest state court constituted a final judgment. *R.J. Reynolds*, 479 U.S. at 137-38. With this, Respondents do not take issue: discretionary jurisdiction does exist in this Court. There is, however, no reason for this Court to exercise it.

2. There is no conflict between courts regarding this issue as it exists under the similar Labor Management Relations Act.

Ohio's Public Employee Collective Bargaining Act, Ohio Rev. Code Sections 4117 *et seq.*, is patterned after the Labor Management Relations Act, 29 U.S.C. Sections 141 *et seq*. The State Employment Relations Board ("SERB"), the body created to administer the Act in Ohio, acts as the functional equivalent of the National Labor Relations Board. Each possesses a dual identity: prosecutor and adjudicator. The prosecution of unfair labor practices under Ohio law is conducted by SERB acting as a prosecutor, much the same as the NLRB General Counsel acts under the LMRA. Adjudication of charges brought by SERB is performed by the Board, a three-member entity that acts as judge, in much the same manner as the NLRB. As the Supreme Court of

Ohio noted in the opinion which is ultimately being challenged by Petitioner, "[T]he procedures for unfair labor practice cases mandated by R.C. 4117.12 and 4117.13 are substantively identical to those established in Section 10 of the Labor Management Relations Act to govern unfair labor practices before the National Labor Relations Board." *Ohio Assn. of Pub. School Employees, Chapter 643 v. Dayton City School Dist. Bd. of Edn.*, 572 N.E.2d 80, 83, 59 Ohio St. 3d 159, 161 (1991)

The issue of the prosecutorial versus the adjudicative function in the context of the powers of the NLRB has been well resolved in the circuits. There is no conflict. These courts have found that a decision of the NLRB General Counsel not to pursue a case, *i.e.*, not finding probable cause to issue a complaint or withdrawing a previously issued complaint in light of new evidence, is not reviewable in court as it is essentially prosecutorial, and, therefore, not an adjudication by the Board.[1]

Further, this denial of review has been uniformly found not to constitute a deprivation of due process. In

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[1] *See, e.g., International Ass'n of Machinists v. Lubbers*, 681 F.2d 598, 602-03 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983); *George Banta Co. v. NLRB*, 626 F.2d 354, 356-57 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Hernandez v. NLRB*, 505 F.2d 119, 120 (5th Cir. 1974); *Braden v. Herman*, 468 F.2d 592, 593 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973); *Saez v. Goslee*, 463 F.2d 214, 214-15 (1st Cir.), *cert. denied*, 409 U.S. 1024 (1972); *National Maritime Union v. NLRB*, 423 F.2d 625, 626 (2d Cir. 1970); *Mayer v. Ordman*, 391 F.2d 889 (6th Cir.), *cert. denied*, 393 U.S. 925 (1968); *Balanyi v. Local 1031, IBEW*, 374 F.2d 723 (7th Cir. 1967); *Hourihan v. NLRB*, 201 F.2d 187 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 930 (1953); *General Drivers, Local 886 v. NLRB*, 179 F.2d 492, 494-95 (10th Cir. 1950). *Cf. Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (instances where this Court has presumed that NLRB prosecutorial decisions are not reviewable in court).

International Ass'n of Machinists v. Lubbers, 681 F.2d 598 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), the appellant asserted a "private right" in the prosecution of its unfair labor practice charge and demanded a hearing before the NLRB General Counsel withdrew a complaint it had initially issued in the case. The Ninth Circuit, while noting that parties often have important rights in the context of an NLRB proceeding, also noted that this right has never been held to be a *constitutional* right. It ultimately found that it did not in fact rise to that level. Correspondingly, no review was required. *Machinists*, 681 F.2d at 603-604.

In *Saez v. Goslee*, 463 F.2d 214 (1st Cir.), *cert. denied*, 409 U.S. 1024 (1972), the First Circuit was also confronted with a due process challenge to this denial of review. Finding that "it is doubtful that appellant has an 'entitlement' to have an unfair labor practice complaint issue in the same sense that, for example, a welfare recipient has a statutory entitlement to benefits," and that the remedies of the LMRA protect "public rather than private rights," the First Circuit refused to elevate the right to constitutional status. *Saez*, 463 F.2d at 215. Even if the "right" was protected by the Due Process Clause, the court did not deem it serious enough to warrant the requirement of a hearing. The court juxtaposed the "right" to review of a decision by the NLRB not to issue a complaint with the termination of welfare benefits at issue in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and found the former to be much less "essential to an individual's continued existence." *Saez*, 463 F.2d at 215. *See also Braden v. Herman*, 468 F.2d 592, 593 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973) (emphasizing the public nature served by the LMRA as reason to deny constitutional status to a charging party's "right" in an unfair labor practice proceeding).

There is, in short, no conflict between the circuit courts as to the constitutionality of the denial of review of NLRB's prosecutorial functions under the Due Process Clause of the Fifth Amendment. Because SERB acts in much the same manner as NLRB, and due process concerns have been addressed by the circuits, there is no conflict between the Supreme Court of Ohio and any circuit court on this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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